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No. 98-9537

In the

Supreme Court of the United States

JUATASSA SIMS,

Petitioner,

vs.

KENNETH S. APFEL,
Commissioner of Social Security,

Respondent.

On Petition for a Writ of Certiorari

To the United States Court of Appeals

For the Fifth Circuit

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Pursuant to Rule 15(8) of the Rules of the United States Supreme Court, Petitioner, Juatassa Sims, files this Supplemental Brief in support of her Petition for a *Writ of Certiorari* to inform the Court of two newly issued circuit court decisions, designated for publication, that directly bear on the issues now pending before this Court. Within the last few weeks, the Seventh and the Eighth Circuits have issued decisions which oppose the application of administrative waiver to bar issues raised by claimants in federal court that were not specifically raised before the Appeals Council. *See Harwood v. Apfel*, No. 98-2700, __ F.3d __, 1999 WL 608649 (8th Cir. Aug. 13, 1999) and *Johnson v. Apfel*, No. 98-4284, __ F.3d __, 1999 WL 675368 (7th Cir. Aug. 30, 1999).[1] Both of these decisions directly conflict with the Fifth Circuit's holding in *Sims*. *See* Appendix[2] at 1-2.

As noted in the Petition for a *Writ of Certiorari* (hereinafter "Petition") previously filed herein in this case, in *Darby v. Cisneros*, 113 S.Ct. 2539 (1993), this Court held that courts should not impose on litigants any administrative exhaustion steps that the agency itself does not require. *See* Petition at 7, 9. As noted in the Petition, the Social Security Administration requires a final exhaustion step to its Appeals Council for aggrieved claimants, but does not require claimants to submit arguments during this informal, non-adversary step. *Id.* at 10-11. In her Petition, Sims asked this Court to consider whether the Fifth Circuit erred in imposing a judicially created "issue exhaustion" requirement in federal court to bar her from raising any arguments that she did not raise before the Appeals Council. *Id.* at 1.

Sims argued that her case presented an important federal question of administrative law for

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[1]Copies of the *Harwood* and *Johnson* decisions are attached as Exhibits A and B, respectively.

[2]The Appendix was attached to Sims' Petition for a *Writ of Certiorari*, filed herein.

which there were compelling reasons for this Court is issue a *writ of certiorari* to review the Fifth Circuit's decision in *Sims*. *Id.* at 7. Relying on Supreme Court Rule 10(c), Sims argued that the Fifth Circuit failed to follow U.S. Supreme Court precedent and violated her due process rights by enforcing administrative issue exhaustion on jurisdictional grounds despite the lack of notice by the Commissioner. *Id.* at 6-16.

In light of the recent *Harwood* and *Johnson* decisions, there is now a definite conflict among the federal circuits on the appropriateness of applying administrative issue exhaustion principles in Social Security cases. The conflict creates yet another basis for seeking a *writ of certiorari* from this Court. *See* Sup. Ct. R. 10(a). The circuit law throughout the country is presently divided on whether a Social Security claimant is barred from raising issues in federal court that the claimant did not raise before the Appeals Council. *Compare Harwood* and *Johnson* with *Paul v. Shalala*, 29 F.3d 208, 210 (5th Cir. 1994).

In rejecting the application of administrative issue exhaustion principles to Social Security cases, in *Johnson* and *Harwood*, the Seventh and Eighth Circuits heavily relied upon the lack of any agency regulation requiring administrative issue exhaustion. *Harwood* at *2; *Johnson* at *2. Both courts focused upon the appropriateness of the imposition of a judicially-created issue exhaustion requirement in the Social Security context and commented upon the lack of consistency on the part of the Commissioner as to the application of the doctrine. *Id.*

Both courts further noted that the "three lines" contained on the Social Security Administration's form for seeking Appeals Council review (the HA-520) hardly provide support for any argument that the agency itself requires issue exhaustion at that level of appeal. *Id.* The Seventh and Eighth Circuits considered the nonadversarial process required for the effective administration of the Social Security benefit program and decided that issue exhaustion did not make sense as the

program is presently administered. The courts also pointed to the lack of any notice to the claimants from the Commissioner that issues not raised to the Appeals Council were waived if later raised in federal court. *Id.*

The Seventh and Eighth Circuit decisions in *Harwood* and *Johnson* directly conflict with the Fifth Circuit's decision in *Sims*. In *Sims*, the Fifth Circuit held that it did not have ***jurisdiction*** to consider her arguments because they were not raised before the Appeals Council. Appendix at 1-2. The *Sims* Court relied upon prior Fifth Circuit precedent, *Paul v. Shalala*, 29 F.3d at 210, that created a jurisdictional bar precluding the claimant from raising issues in federal court that were not specifically raised before the Appeals Council. *Id.*

The division among the circuits as to the appropriateness of administrative issue exhaustion in Social Security cases will necessarily result in inequities among claimants. On the same procedural facts, two claimants with identical cases will be treated differently depending upon which jurisdiction they reside. One claimant will be permitted to raise arguments not raised administratively and succeed in federal court and potentially obtain benefits. On the same facts, in another jurisdiction, another claimant will be booted out of court and never receive benefits. Such scenarios will become common-place unless this Court addresses the issue to ensure uniformity.

Moreover, even as the law existed prior to the publication of the *Harwood* and *Johnson* cases, the General Counsel of the Social Security Administration, Arthur J. Fried, already admitted that the agency did not raise administrative issue exhaustion principles uniformly in all cases.[2] Specifically, Mr. Fried stated:

> This court-fashioned rule, which has been variously termed "administrative waiver" and "issue exhaustion," is designed to enable the administrative process to function on a more informed basis, to the benefit of disability claimants as well as Agency adjudicators, and to obviate the need for court involvement in certain cases by timely alerting the Agency to the need for corrective action prior to the commencement of litigation . . . .
>
> While we believe that the administrative waiver rule helps to promote better service to disability claimants, we also note that the defensive utilization of the administrative waiver rule, must, at times, be limited to avoid possible injustice. Accordingly, [Office of General Counsel] litigators do not cite the rule in cases where plaintiffs are unrepresented at the administrative level; do not rely exclusively on the rule, without a substantive response to the particular challenges asserted by the plaintiffs; and do not consider the rule in making pre-briefing defensibility determinations.

Mr. Fried has further admitted that administrative issue exhaustion is a judicially created doctrine, and thus not one supported by regulations, consistent with the decisions of *Harwood* and *Johnson*.

Due to the lack of uniformity among the circuits, and even within the Social Security Administration, as to the application of administrative issue exhaustion principles in Social Security cases, Sims respectfully urges this Court to issue a *writ of certiorari* to review the Opinion of the United States Court of Appeals for the Fifth Circuit.

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[2] A copy of a letter from Arthur Fried, General Counsel of the Social Security Administration, dated July 15, 1999, is attached as Exhibit C.

Patrick HARWOOD, Plaintiff--Appellant,
v.
Kenneth S. APFEL, Commissioner, Social Security Administration, Defendant--Appellee.

No. 98-2700.

United States Court of Appeals,
Eighth Circuit.

Submitted: May 12, 1999.

Filed: Aug. 13, 1999.

Appeal from the United States District Court for the District of South Dakota.

Before RICHARD S. ARNOLD, JOHN R. GIBSON, and BOWMAN, Circuit Judges.

GIBSON, Circuit J.

*1 Patrick Harwood appeals the judgment of the district court, [FN1] which affirmed the denial of his application for social security disability benefits. The Social Security Administration denied Harwood's initial application, and an Administrative Law Judge denied benefits after a hearing. The Appeals Council denied Harwood's request for further review, and the ALJ's decision became the final decision of the Commissioner. Harwood argues that the ALJ failed to fully and fairly develop the record, that the ALJ's decision ignores Harwood's limited intellectual abilities, and that the decision is otherwise not supported by substantial evidence. The district court held that Harwood waived the first two arguments because he failed to include them in his brief to the Appeals Council, and it rejected the third argument on its merits, holding that substantial evidence supported the ALJ's rejection of Harwood's subjective complaints of disabling pain. We affirm the judgment of the district court because we reject Harwood's arguments on their merits.

Harwood is forty-three years old, has a tenth-grade education, and formerly worked as a jewelry manufacturer and cleaner. He stopped working in September 1994 because he experienced pain throughout his shoulders, elbows, wrists, and hands. He applied for disability benefits on April 12, 1995, and the ALJ denied benefits in September 1996 after a hearing. The ALJ analyzed Harwood's claim through the familiar five-step process set out by the Social Security Regulations. See 20 C.F.R. § 404.1520(a)-(f) (1999); McCoy v. Schweiker, 683 F.2d 1138, 1141-42 (8th Cir.1982). Harwood showed that he was unable to return to his previous employment, and at the fifth step of the process, the ALJ determined that Harwood could perform various jobs that exist in the national economy even though he could not work as a manufacturer and cleaner of jewelry. If Harwood can perform such jobs in the national economy, he is not "disabled" within the meaning of the Social Security Act. See Weiler v. Apfel, ___ F.3d ___, No. 98-1480, 1999 WL 404691, at *1 (8th Cir. June 21, 1999).

The ALJ's conclusion was predicated upon a hypothetical question that he posed to a vocational expert. Harwood's treating physician concluded that Harwood could perform "light" work with "no repetitive upper extremity activities," provided that he receive the "opportunity for mini rest breaks for his upper extremities and to rotate activities." The ALJ asked whether an individual with Harwood's skills, work experience and physical limitations could find any unskilled jobs in the national economy. The vocational expert responded that an individual fitting the ALJ's description could find work as a parking enforcement officer, a parking lot attendant, a house-sitter, or a driver. Based largely upon this evidence, the ALJ concluded that Harwood was not entitled to disability benefits.

We must uphold the ALJ's decision if it is supported by substantial evidence. See Metz v. Shalala, 49 F.3d 374, 376 (8th Cir.1995). Our task is not to reweigh the evidence, and we may not reverse the Commissioner's decision merely because substantial evidence would have supported an opposite conclusion or merely because we would have decided the case differently. See Woolf v. Shalala, 3 F.3d 1210, 1213 (8th Cir.1993); Smith v. Shalala, 987 F.2d 1371, 1374 (8th Cir.1993). In determining whether substantial evidence supports the ALJ's decision, we must consider evidence in the record that supports the ALJ's decision as well as evidence that detracts from it. See Brockman v. Sullivan, 987 F.2d 1344, 1346 (8th Cir.1993).

*2 At the outset, we reject the Commissioner's argument that Harwood forfeited two of the three issues he now raises by failing to raise them before the Appeals Council. Although a party seeking judicial review of an agency action must generally exhaust available agency remedies and may not

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EXHIBIT A

generally proceed upon an argument not made to the agency, see McCarthy v. Madigan, 503 U.S. 140, 144-45 (1992), the general rule makes little sense in this particular context. Several considerations compel the conclusion that Harwood has not waived the arguments that he did not specifically address to the Appeals Council.

First, the Commissioner urges us to adopt a waiver rule that the agency does not itself enforce. The Appeals Council routinely considers arguments not specifically raised by claimants before it--a product of its duty to review an ALJ's decision "in an informal, nonadversary (sic) manner" and a fitting analogue to the ALJ's well-established duty to develop a full and fair record (even when, as here, claimants are represented by counsel). See 20 C.F . R. §§ 404.900(b), 416.1400(b) (1999); Jon C. Dubin, Torquemada Meets Kafka: The Misapplication of the Issue Exhaustion Doctrine to Inquisitorial Administrative Proceedings, 97 Colum. L.Rev. 1289, 1325-26 and n. 179 (1997); Wilcutts v. Apfel, 143 F.3d 1134, 1137-38 (8th Cir.1998) (stating that Commissioner has duty to develop record because hearing is non-adversarial; "The goals of the Secretary and the advocates should be the same: that deserving claimants who apply for benefits receive justice.") (quotation omitted).

Second and relatedly, the Appeals Council's non-adversarial proceedings give claimants like Harwood no advance notice that issues not specifically raised will be forfeited. The Commissioner's own regulations establish a one-page form, the HA-520, through which claimants who lose before the ALJ may request review by the Appeals Council. See 20 C.F.R. § 422.205(a) (1999). The form provides a three-line space for claimants to articulate the grounds for appeal--and no warning of the waiver rule that the Commissioner now urges. See Dubin, supra, at 1305, 1332. Indeed, Harwood himself received no notice of such a waiver rule. The ALJ's written decision denying benefits stated that the Appeals Council "may review your case for any reason." Further, the decision warned Harwood that he could not obtain judicial review unless he first sought review by the Appeals Council, or unless the Council reviewed the ALJ's decision on its own motion. Nowhere did it state that Harwood would forfeit issues not raised to the Council, and the ALJ's reassurance that the Council "may review your case for any reason" misleadingly implies otherwise. In effect, the Commissioner urges us to deny judicial review to those claimants who have relied upon the agency's own professed duty to proceed in an "informal, nonadversary manner." We decline to do so.

*3 Third, we are not persuaded by the cases cited in support of the Commissioner's position. As an initial matter, most of them involve issues that claimants failed to raise not only before the ALJ and the Appeals Council, but before the district court as well. See Weikert v. Sullivan, 977 F.2d 1249, 1254 (8th Cir.1992); Johnson v. Chater, 108 F.3d 942, 945-46 (8th Cir.1997). [FN2] Obviously, there are reasons why we, an adversarial forum, choose not to review issues that parties do not raise to the district court, another adversarial forum, that have little bearing on whether a federal court should consider an issue not raised before the Social Security Appeals Council. Weikert and Johnson do not establish that one's failure to present an argument to the Appeals Council, without more, creates an insuperable bar to judicial review, and we believe the Commissioner reads them too broadly. Furthermore, Weikert and Johnson are otherwise readily distinguishable. Weikert involved a claimant's failure to preserve the argument that the ALJ "displayed such hostility to Weikert that [the ALJ's behavior] deprived Weikert of his right to an impartial hearing." 977 F.2d at 1254. We declined to address the argument, for Weikert not only failed to present it to the district court, but failed to follow a specific procedure outlined by the agency for disqualifying an ALJ for prejudice. See id. There is no such analogous procedure involved in this case. Johnson, moreover, primarily concerns the inability of a claimant to present new evidence to the district court through a motion to alter or amend the district court's judgment under Fed.R.Civ.P. 59(e), after having failed to do so at the first opportunity. See 108 F .3d at 945-46. We believe that Johnson 's holding simply reflects Rule 59(e)'s limited purpose, and that it does not control the present case. Finally, the Commissioner directs our attention to numerous cases from other circuits. We find these cases either inapposite [FN3] or unpersuasive, [FN4] in light of the above discussion.

Addressing the merits of Harwood's claims, we first reject his argument that the ALJ did not fully and fairly develop the record. The ALJ's hypothetical question to the vocational expert included the findings of Harwood's treating physician, who concluded that Harwood could perform "light" work with "no repetitive upper extremity activities" if he received the "opportunity

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for mini rest breaks for his upper extremities and to rotate activities." The vocational expert testified that an individual with Harwood's skills, work experience, and physical limitations could work as a parking enforcement officer, a parking lot attendant, a house-sitter, or a driver. Harwood argues that the terms "repetitive" and "mini rest breaks" are ambiguous and that the ALJ should have clarified their meaning by posing interrogatories to Harwood's treating physician. In particular, Harwood argues that "repetitive" could, on one hand, describe a job involving the same motion throughout the day, or, on the other, a job involving the same motion performed for discrete periods of time during the day. Further, he argues, the phrase "mini rest breaks" does not specify the frequency or duration of the breaks that Harwood needs. We are unpersuaded. The vocational expert stated that none of the jobs that Harwood could perform "are in any sense repetitive," and the hypothetical question described one's need for "normal breaks" during the working day. "A proper hypothetical question presents to the vocational expert a set of limitations that mirror those of the claimant." Hutton v. Apfel, 175 F.3d 651, 656 (8th Cir.1999). Id. (quotation omitted). The hypothetical posed to the vocational expert could have been more precise, but we believe that it adequately described Harwood's limitations.

*4 Harwood next argues that the ALJ's finding ignores various intellectual deficiencies discovered during a vocational assessment in July 1995--three months after Harwood applied for benefits. We reject this argument. First, Harwood misreads the record. The ALJ did not ignore the assessment, but rather declined to give it "any significant probative weight." Second, the ALJ's decision to discount the assessment was entirely reasonable. The assessment conflicted with those of Harwood's treating and examining physicians, and it primarily concerned various transferable skills without assessing any unskilled work that Harwood might be capable of performing (such as that described by the vocational expert). Further, Harwood's previous success as a cleaner and manufacturer of jewelry before the onset of his pain belies his claim that he lacks the intellectual capacity to perform the unskilled jobs described by the vocational expert. Although one's physical ability to perform a job does not necessarily imply that he or she "has the mathematical, reasoning, or language skills to perform the duties [of the job] on a full-time basis in a sometimes competitive and stressful environment in the working world," Titus v. Callahan, 133 F.3d 561, 562 (8th Cir.1997), we believe that the ALJ did not err by assigning little probative weight to Harwood's alleged intellectual deficiencies.

Finally, Harwood attacks the ALJ's rejection of Harwood's subjective complaints of disabling pain. "[T]he ALJ must ... set forth the inconsistencies in the record that lead him to reject the claimant's complaints." Jeffery v. Sec. of Health & Human Servs., 849 F.2d 1129, 1132 (8th Cir.1988). "In order to properly evaluate a claimant's subjective complaints of pain, the ALJ is required to make a credibility determination by taking into account the following factors: (1) the claimant's daily activities; (2) the duration, frequency, and intensity of the pain; (3) the dosage, effectiveness, and side effects of medication; (4) precipitating and aggravating factors; and (5) functional restrictions." Hutton v. Apfel, 175 F.3d 651, 654-55 (8th Cir.1999) (citing Polaski v. Heckler, 739 F.2d 1320, 1322 (8th Cir.1984)).

Under these standards, we conclude that substantial evidence supports the ALJ's credibility determination. Harwood's treating physician performed a functional capacity assessment and determined that Harwood was capable of light work that did not involve repetitive upper extremity motions. An orthopedic surgeon, in turn, found that Harwood's upper extremity area was essentially normal with no localized tenderness or swelling, and determined that Harwood was capable of "light duty work" and should seek retraining for new job skills. Harwood told his physical therapist that he had only intermittent pain while working and no pain at rest or at night, and a physician who examined Harwood at the request of his workers' compensation carrier turned down Harwood's request for a slip stating that he could not work because the physician "really didn't think he was totally disabled from doing any type of job." At one point, Harwood was discharged from physical therapy for failing to reschedule missed appointments. See Thomas v. Sullivan, 928 F.2d 255, 259-60 (8th Cir.1991) (failure to follow prescribed treatment is relevant to substantial evidence analysis). Harwood's day-to-day activities further supported the ALJ's credibility determination. The record showed that Harwood could care for his two-year-old child while his wife worked; that he could perform light housekeeping chores such as the laundry as well as "light house cleaning and odd jobs around the house [for] 1 to 2 hours[,] four days a week;" and that he could draw cartoons for at least one hour at a time, three times a

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week. Although Harwood presented contrary evidence to support his claim, we conclude that the record amply supports the ALJ's credibility finding.

*5 For the foregoing reasons, the judgment of the district court is affirmed.

FN1. The Honorable Richard H. Battey, United States District Judge for the District of South Dakota.

FN2. See also Riggins v. Apfel, 177 F.3d 689, 693 (8th Cir.1999) (same). Riggins was issued after oral argument in the present case.

FN3. The first of these, James v. Chater, 96 F.3d 1341, 1344 (10th Cir.1996), is inapplicable on its face: "[I]ssues not brought to the attention of the Appeals Council on administrative review may, given sufficient notice to the claimant, be deemed waived on subsequent judicial review." (emphasis added). Two others, Meanel v. Apfel, 172 F.3d 1111, 1115 (9th Cir.1999), amended by Meanel v. Apfel, ___ F.3d ___, No. 97- 55827, 1999 WL 415342 (9th Cir. June 22, 1999), and Brewer v. Chater, 103 F.3d 1384, 1393 (7th Cir.1997), concern arguments raised before neither the ALJ nor the Appeals Council--perhaps presenting a stronger case for a waiver rule. Here, by contrast, the only procedural default alleged by the Commissioner and found by the district court is Harwood's failure to bring two particular issues to the Appeals Council's attention. We need not decide whether Harwood's apparent failure to raise two of his issues before the ALJ is fatal to his claims, but it strikes us as odd that Harwood could "waive" his argument that the ALJ should have acted sua sponte to develop the record more fully.

FN4. See Paul v. Shalala, 29 F.3d 208, 210 (5th Cir.1994) (no jurisdiction to review claim not raised before Appeals Council).

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Walter JOHNSON, Plaintiff-Appellant,
v.
Kenneth S. APFEL, Commissioner of Social Security, Defendant-Appellee.

No. 98-4284.

United States Court of Appeals,
Seventh Circuit.

Argued Aug. 3, 1999.

Decided Aug. 30, 1999.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division. No. 97 C 1863--Larry J. McKinney, Judge.

Before POSNER, Chief Judge, and EASTERBROOK and MANION, Circuit Judges.

POSNER, Chief Judge.

*1 Mr. Johnson sought review in the district court, pursuant to 42 U.S.C. sec. 405(g), of the denial by the Social Security Administration of his claim for disability benefits. The district court upheld the denial on the merits, and Johnson has appealed to us. But the Administration asks us not to consider the merits of the appeal, on the ground that Johnson failed to advise the Administration's Appeals Council of the issue that he wants us to decide (he did present it to the district court). Johnson's last full-time job was as a carpenter, and the administrative law judge found that despite the alleged disability Johnson could still do a carpenter's work. Johnson challenges this finding on the ground that the administrative law judge had purported to accept medical reports from two physicians who found that Johnson has only limited use of his right arm (and he is right-handed), and did not explain how one can do carpentry with such a limitation. But in his letter asking the Appeals Council to review the administrative law judge's decision, Johnson's then lawyer did not make this argument. Apart from unrelated and now-abandoned procedural points, the letter recites evidence indicating that Johnson has arthritis and other ailments, and "loss of range of motion." There is no reference to the right arm, and the letter ends with the mysterious statement: "These are the 'objective medical findings' which the ALJ found shows only minimal findings."

If this letter were a brief in this court, there would be no doubt that Johnson had waived his right to raise the right-arm issue; for we require that an issue to be preserved must be developed and not merely mentioned (here barely alluded to). E.g., JTC Petroleum Co. v. Piasa Motor Fuels, Inc., No. 98-3919, slip op. at 10-11 (7th Cir. Aug.17, 1999); Huntzinger v. Hastings Mutual Ins. Co., 143 F.3d 302, 308 n. 7 (7th Cir.1998); Colburn v. Trustees of Indiana University, 973 F.2d 581, 593 (7th Cir.1992); Turner v. Chicago Housing Authority, 969 F.2d 461, 463 (7th Cir.1992); Burdett v. Miller, 957 F.2d 1375, 1382 (7th Cir.1992). Likewise if Johnson had made so murky a presentation to the administrative law judge. E.g., Brewer v. Chater, 103 F.3d 1384, 1393 (7th Cir.1997). And a number of cases, including some in this court, hold or assume that the same is true of an appeal from an administrative law judge to the Appeals Council. Banuelos v. Apfel, 165 F.3d 1166, 1170 (7th Cir.1999) (alternative holding); Brewer v. Chater, supra, 103 F.3d at 1393; Griffith v. Callahan, 138 F.3d 1150, 1154 (7th Cir.1998) (alternative holding); Limberopoulos v. Shalala, 17 F.3d 975, 979 (7th Cir.1994); Pope v. Shalala, 998 F.2d 473, 480 n. 6 (7th Cir.1993); Papendick v. Sullivan, 969 F.2d 298, 302 (7th Cir.1992); James v. Chater, 96 F.3d 1341, 1343-44 (10th Cir.1996); Paul v. Shalala, 29 F.3d 208, 210-11 (5th Cir.1994); see Jon C. Dubin, "Torquemada Meets Kafka: The Misapplication of the Issue Exhaustion Doctrine to Inquisitorial Administrative Proceedings," 97 Colum. L.Rev. 1289, 1310-16 (1997). But these decisions--as the Eighth Circuit has also concluded, in a decision rendered after the oral argument in this case, Harwood v. Apfel, No. 98-2700, 1999 WL 608649 (8th Cir. Aug.13, 1999)-- cannot be squared with the regulations governing appeals to the Appeals Council. Our cases do not mention the regulations, which may not even have been cited to us. Papendick, the first in our line, relies entirely on a decision that involved the doctrine of exhaustion of remedies in an unrelated area of administrative regulation, Weyerhaeuser Co. v. Marshall, 592 F.2d 373, 376 (7th Cir.1979), while in the present case the agency doesn't even argue that there was a failure to exhaust.

*2 The regulations permit but do not require the filing of a brief with the Appeals Council. 20 C.F.R. sec. 404.975. All that is required is completion of a one-page form (Form HA-520) that provides only a space of three lines (roughly two inches in total) for the statement of the issues and grounds for appeal.

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EXHIBIT B

20 C.F.R. sec. 422.205(a). (Johnson's lawyer appended his onepage letter to the form rather than attempting to squeeze his argument into the tiny space.) The Appeals Council's review is, moreover, plenary unless the Council states otherwise. sec. 404.976(a). Basically all that seems contemplated or required is that the disappointed claimant ask the Appeals Council to take a look at what the administrative law judge has done and reverse if it finds an error. The Appeals Council operates more like a complaint bureau than an appellate court; the Social Security Administration estimates that the Council spends no more than 10 minutes per appeal, on average. Dubin, supra, 97 Colum. L.Rev. at 1326 n. 181. We do not know what the Appeals Council does in cases in which the appellant leaves the space in his Form HA-520 completely blank, and therefore need not decide whether that would be a case of waiver.

The only reference in the regulations to anything that looks like waiver is a warning that if the applicant fails to "take the next step [in the review process] within the stated time period, you will lose your right to further administrative review and your right to judicial review" (unless you show cause for the failure). 20 C.F.R. sec. 404.900(b). Johnson took the required next step after being turned down by the administrative law judge by filing his Form HA520 on time with the Appeals Council. The Social Security Administration knows how to draft a waiver rule. If courts take it upon themselves to adopt waiver rules for the agency that compel disappointed applicants for disability benefits to bombard the Appeals Council with full briefs in order to preserve their right to judicial review, we shall be disserving the agency. The government's lawyers argue that Johnson has waived his right to present the "right arm" issue to us because of his failure to present it perspicuously to the Appeals Council, yet they are explicit that he did not fail to exhaust his administrative remedies. We take this to mean, consistent with the discussion in the preceding paragraph, that requiring the claimant to brief his issues before the Appeals Council is not important to the agency's mission. (Because we are overruling the decisions of this court, cited earlier, that impose this requirement, we have circulated our opinion to the full court, as required by 7th Cir. R. 40(e). No judge in regular active service asked that the case be heard en banc.)

It may be arguable that the letter by Johnson's lawyer was positively misleading--was calculated to deflect the Appeals Council from taking a close look at the right-arm issue, since that issue wasn't discussed but others were (sort of). But the Administration's lawyers do not argue this, and that is a waiver, since by failing to argue it they deprived Johnson of an opportunity to meet the argument.

*3 So we come to the merits. When a claimant argues that there are fatal gaps or contradictions in the administrative law judge's opinion, thus appealing to the important principle of administrative law that the agency provide a rational articulation of the grounds of its decision, SEC v. Chenery Corp., 318 U.S. 80, 94-95, 63 S.Ct. 454, 87 L.Ed. 626 (1943); Sarchet v. Chater, 78 F.3d 305, 307 (7th Cir.1996); Rohan v. Chater, 98 F.3d 966, 971 (7th Cir.1996); Herron v. Shalala, 19 F.3d 329, 333 (7th Cir.1994); Schurz Communications, Inc. v. FCC, 982 F.2d 1043, 1049 (7th Cir.1992), we give the opinion a commonsensical reading rather than nitpicking at it. E.g., Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 286, 95 S.Ct. 438, 42 L.Ed.2d 447 (1974); Rohan v. Chater, supra; Cronin v. U.S. Dept. of Agriculture, 919 F.2d 439, 442-43 (7th Cir.1990). In this case the opinion recites at great length the medical evidence of Johnson's alleged disability, including a report by one doctor that Johnson has a diminished range of motion in his right arm. The opinion rejects this evidence on the ground that it was based solely on Johnson's statement to the doctor and that while Johnson attributed the problem to a wall falling on him he was unable to produce any evidence of the accident or of any treatment for it. It was after this that the administrative law judge mentioned medical opinions "from the State Agency physicians who essentially concluded that the claimant can perform a wide range of medium work activity.... There is no objective medical evidence invalidating this residual functional capacity. Consequently I adopt the opinion of the State Agency physicians." He neglected to point out that these physicians had checked the box for "limited" beside a subcategory of "manipulative limitations" captioned "Reaching all directions (including overhead)." Since elsewhere in the report the physicians had indicated in detail an absence of any relevant exertional limitations, the administrative law judge was entitled to conclude that the fact that Johnson cannot reach in all directions without some unspecified limitations was insufficient to establish that he can't perform his past work as a carpenter. That the administrative law judge did conclude this rather than overlook the check mark in the "limited"

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box seems to us the most plausible interpretation of the opinion, and no more is required to uphold it. Books v. Chater, 91 F.3d 972, 980 (7th Cir.1996); Diaz v. Chater, 55 F.3d 300, 307-08 (7th Cir.1995); Carlson v. Shalala, 999 F.2d 180 (7th Cir.1993) (per curiam).

Affirmed.

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SOCIAL SECURITY

Office of the General Counsel

JUL 15 1999

Ms. Nancy G. Shor
Executive Director
National Organization of Social Security
Claimants' Representatives
6 Prospect Street
Midland Park, New Jersey 07432

Dear ~~Ms. Shor~~ Nancy:

Thank you for affording me the opportunity to participate in the recent conference of the National Organization of Social Security Claimants' Representatives (NOSSCR). Although our dialogues revealed, not surprisingly, that there are certain differences of perspective between NOSSCR members and the Social Security Administration's (SSA) Office of the General Counsel (OGC), it was apparent that we share a commitment to fairness, justice, open communication and responsible advocacy in an area of the law which affects so profoundly the lives of so many. It is my sincere hope that the candid and respectful sharing of views which characterized our dialogues will lead to improved understanding, an even more productive working relationship between SSA and members of the legal advocacy community, and better SSA processes supporting litigation to the benefit of all concerned.

At the conference, NOSSCR members expressed concerns regarding OGC's perceived policy in a number of specific areas, in particular, the defensive citation of the "administrative waiver" rule, the Government's role in the attorney fee process under § 206(b) of the Social Security Act, and the content of remand orders when remands have been voluntarily initiated by the Government. In this letter, I will attempt to clarify OGC's position with regard to each of these issues.

The Administrative Waiver Rule

As you know, most circuit courts have now adopted, in Social Security disability cases, the longstanding rule of administrative law that issues not asserted with particularity at the administrative level will not be considered on subsequent judicial review, and no appellate court has opined that the rule is inapplicable in the Social Security context. This court-fashioned rule, which has been variously termed "administrative waiver" and "issue exhaustion," is designed to enable the administrative process to function on a more informed basis, to the benefit of disability claimants as well as Agency adjudicators, and to obviate the need for court

EXHIBIT C

involvement in certain cases by timely alerting the Agency to the need for corrective action prior to the commencement of litigation. To their credit, an increasing number of Social Security practitioners are now heeding the litany of judicial pronouncements, and we are seeing more clearly defined challenges being asserted, and at times accepted, at the Appeals Council level.

While we believe that the administrative waiver rule helps to promote better service to disability claimants, we also note that the defensive utilization of the administrative waiver rule must, at times, be limited to avoid possible injustice. Accordingly, OGC litigators do not cite the rule in cases where plaintiffs are unrepresented at the administrative level; do not rely exclusively on the rule, without a substantive response to the particular challenges asserted by the plaintiffs; and do not consider the rule in making pre-briefing defensibility determinations. In light of the concerns expressed by NOSSCR members, we will redouble our efforts to ensure that our litigators apply these principles when considering this argument.

Attorney Fees under the Social Security Act

The courts have frequently recognized that the Commissioner has a legitimate role in the fee determination process under § 206(b) of the Social Security Act, 42 U.S.C. § 406(b), a role designed to ensure that claimants' past-due benefits are not unduly eroded and one which recognizes the impartial expertise which the Commissioner can provide. In performing this advisory role, we are cognizant, of course, of the attorney's right to reasonable compensation. We are equally aware that the statutory entitlement to a "reasonable" fee does not necessarily equate to a contractually-specified contingent fee, particularly since the amount of the contingent fee may be related to factors other than the skill and effort of counsel, such as the claimant's prior earnings and the number of his or her dependents.

In this context, our attorneys take seriously their responsibility to protect claimants from the relatively rare instances of over-reaching by their counsel in the fee application process. Accordingly, while in many (perhaps most) cases we do not oppose the fees requested, we view such oppositions as being justified where (1) the hourly rate claimed is clearly in excess of the rate prevailing in the particular jurisdiction involved and/or (2) the hours itemized are either clearly excessive for the discrete categories of work performed or include items which have been judicially viewed as non-compensable (such as clerical tasks or the preparation of fee petitions).

We recognize, of course, that perceptions may differ as to when a requested fee falls short of the statutory standard of reasonableness, particularly when one's financial interest is at stake. Nevertheless, by adhering (in our advisory role) to those guidelines which have been carefully enunciated by the courts, we believe that we can assist in achieving the desired balance between the competing interests of plaintiffs' attorneys and their clients in the fee determination process.

Remand Orders

We are currently in the process of formulating a nationwide practice regarding the content of remand orders when remands have been voluntarily initiated by the Government. Accordingly, while there may currently be inconsistencies in the approach taken by particular OGC offices and individual litigators, we are hopeful that these inconsistencies will be minimized in the near future with the adoption of a standardized, nationwide approach.

In broad outline, under the process we are considering, OGC will attempt to ensure that ALJs are afforded adequate discretion in the post-remand development of cases in light of the evidence presented, without judicially-imposed constraints which might well prove to be unnecessary in the course of the post-remand proceedings. For example, while an ALJ's failure to have obtained vocational expert testimony might have provided the basis for the Government's remand request in a particular case, a court order mandating such testimony could conceivably be inappropriate where a reevaluation of the record as a whole leads the ALJ to conclude that an allowance is warranted at the Listing step of the sequential evaluation process. Although we will accordingly be seeking generalized orders of remand from the courts, i.e., for further administrative proceedings, we are attempting to ensure that the subsequent orders of remand issued by the Appeals Council will be sufficiently detailed to apprise the ALJs of the substantive and procedural deficiencies which formed the basis for the requested remand.

I trust that this letter is responsive to the concerns expressed by your members, and look forward to a continuation of our candid and productive discussions.

Very truly yours,

Arthur J. Fried
General Counsel